No. 01-1184

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

FRANCISCO JIMENEZ RECIO AND
ADRIAN LOPEZ-MEZA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The government's central assertion is that, under long-settled principles of the law of conspiracy, the impossibility of a conspiracy's achieving its objectives does not prevent criminal liability for the conspirators, if the conspirators do not know of the circumstances that make the conspiracy's success impossible. The gist of a conspiracy is the agreement. Facts unknown to the conspirators that frustrate the conspiracy's success can have no bearing on their agreement, and therefore those facts cannot defeat the conspirators' liability.

Respondents do not defend the proposition that a conspiracy terminates as a matter of law when, unbeknownst to the conspirators, the conspiracy's goals have been frustrated. Instead, their primary argument

is that the evidence in this case was insufficient to show that the particular conspiracy alleged in the indictment survived the seizure of the drugs. That argument is mistaken. The evidence was overwhelming that respondents engaged in the charged conspiracy to distribute drugs, and their appearance to pick up the drugs on the day after the seizure demonstrates conclusively that the conspiracy survived the seizure.

The only basis for the court of appeals' decision—both in this case and in its antecedent, *United States* v. *Cruz*, 127 F.3d 791 (9th Cir. 1997), cert. denied, 522 U.S. 1097 (1998)—is the view that the conspiracies charged necessarily terminated, as a matter of law, when the original couriers were apprehended. The premise underlying those holdings is that a conspiracy necessarily ends when an event occurs that, unbeknownst to the conspirators, renders the conspiracy's success impossible. That rule is contrary to decades of precedent from this Court and the lower federal courts and bedrock principles of the law of conspiracy.

I. A CONSPIRACY DOES NOT AUTOMATICALLY TERMINATE WHEN THE GOALS OF THE CONSPIRACY, UNBEKNOWNST TO THE CONSPIRATORS, ARE FRUSTRATED

Lopez-Meza contends (Br. 14-15) that "the scope and duration of a conspiracy is a question of fact," which turns on (Br. 15) "the precise nature of the given criminal agreement, the specifications of the indictment, and what frustration subsequently occurs." He submits (Br. 12) that this case and *Cruz* "simply recognized that, on the facts presented," that the defendants had not joined the "specific conspiracy charged in the indictment before it ended" by "the seizure of the drugs." The scope and duration of a conspiracy *is* a

question of fact, but the frustration of the conspiracy's goals does not necessarily terminate the conspiracy. The crucial issue is what the conspirators knew and intended to accomplish. When the conspirators are continuing their efforts to achieve the conspiracy's criminal objectives, developments of which the conspirators are unaware do not terminate the conspirators' agreement. Yet the court of appeals in this case and in *Cruz* relied *only* on such developments in finding that the conspiracy terminated. That error of law warrants reversal of the judgment below.

A. *Cruz* Did Not Make A Factual Finding On The Conspiracy's Duration

The court in *Cruz* did not find that the conspirators had, as a factual matter, abandoned efforts to complete their conspiratorial goals on the day that law enforcement officers seized the drugs and arrested the original courier. To the contrary, the opinion in *Cruz* made clear that the court's holding that the conspiracy terminated when the drugs were seized had nothing to do with the conspirators' own conduct. In the court's view, the single factor that terminated the conspiracy was the seizure of the drugs. See 127 F.3d at 794 n.1 ("The authorities[']intervention terminated the conspiracy."); *id.* at 795 ("[T]he conspiracy * * * had been terminated by the government's seizure of the methamphetamine."). The reason that the seizure terminated the conspiracy, in the court's view, was that "it was factually impossible for Cruz to have been a member of [the original conspiracy] because [the original courier and his companion] had been arrested and the drugs seized before he was even invited to join." *Id.* at 795 n.4.

Indeed, the court of appeals in *Cruz* recited facts establishing, under ordinary principles of conspiracy law, that the conspiracy continued after the seizure. The court explained that the two key co-conspirators —Mesa, the supplier, and Tenorio, the buyer—were unaware of the seizure. 127 F.3d at 803. After the seizure, the court also noted, there were "several phone calls between [the seized courier], Mesa, and Tenorio." *Id.* at 794. Ultimately, the court stated, "Mesa called [the arrested courier] and informed him that Cruz would come to Honolulu and take the drugs to Guam." *Ibid.* Those facts establish that the conspirators continued to pursue their agreement to achieve the conspiracy's objective even after the seizure took place. That is not surprising since the conspirators were unaware of the seizure. It follows that the conspiracy itself had not terminated under ordinary principles of conspiracy law. The court, however, acquitted Cruz because it rejected the key principle that a conspiracy does not terminate merely because achieving its goals is—or has become— impossible.[1]

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[1] Lopez-Meza contends (Br. 15) that the government "overstates the precise holding of" *Cruz*, because "[t]he conspiracy [in *Cruz*] was limited to an agreement by Balajadia [the original courier] to carry a 210 gram package of drugs from California to Tenori[o] in Guam, at the behest of Mesa, and with the assistance of Taitano [another courier]." The indictment did not narrow the agreement in the manner that respondent suggests. To the contrary, the indictment "charged a five-member conspiracy of Balajadia, Taitano, Tenorio, Mesa, *and Cruz*," *Cruz*, 127 F.3d at 795 n.4 (emphasis added), to distribute methamphetamine and to possess it with intent to distribute it, *id.* at 794. That allegation meant that, at one time or another, each of the five was a member of the conspiracy; the indictment did not allege—and, in any event, the government did not have to prove—that all were members of the conspiracy at the same time. See p. 10, *infra*. The fact that Cruz

B. The Holding Below Rests On A Legal Principle, Not A Factual Finding On The Duration Of The Conspiracy

The court of appeals in this case similarly rested its decision entirely on the rule that frustration of the conspiracy's goals terminated the conspiracy as a matter of law. The court of appeals made it clear that the *Cruz* rule dictated its result in this case. The court never mentioned the indictment in its analysis. Pet. App. 2a-8a. The panel majority accepted both that the indictment charged that respondents entered an agreement with the key identified conspirators to distribute and to possess with intent to distribute cocaine and marijuana, and that the evidence at trial was sufficient to prove such an agreement. See *id.* at 4a (respondents' false statements show that they knew "*they were involved in illicit activity* at" the time of their arrest but "provides no basis for concluding that they were involved in the conspiracy *beforehand*") (emphasis added); *id.* at 5a (respondents' possession of pagers shows only that "whoever *recruited them*" wanted to have them "outfitted * * * with the standard equipment used in the trade" and that "the main conspirators would want to stay in especially close communication with *their drivers*") (emphasis added); *id.* at 5a-6a (response to Arce's page in Arizona indicates that respondents "were simply drivers hired at the last minute"); *id.* at 6a (acknowledging that respondents had a "limited role * * * in the * * * shipment"); see also *id.* at 14a (B. Fletcher, J., concurring) ("[t]he government's *post-seizure* evidence notwithstanding

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may not have been involved until Balajadia and Taitano had been arrested was thus entirely consistent with the indictment, contrary to Lopez-Meza's argument (Br. 16).

* * *, this does not amount to evidence beyond a reasonable doubt of *pre*-seizure involvement").

Despite accepting that respondents joined in a criminal agreement to distribute drugs, the court of appeals reversed respondents' convictions because it found the evidence insufficient to show their "pre-seizure involvement," Pet. App. 5a, *i.e.*, that they joined the agreement before it automatically terminated under the *Cruz* rule. That determination had nothing to do with the allegations in the indictment or the culpability of respondents. It was based instead on the court's legal rule that, regardless of how the indictment is framed or what the evidence shows about the conspirators' continued efforts to achieve their goals, a conspiracy terminates when its goals become impossible to achieve.[2]

C. Appellate Precedent Does Not Support The Court Of Appeals' Holding

Respondent Lopez-Meza contends (Br. 17-25) that the court of appeals' holding that a conspiracy terminates when its goals are frustrated is consistent with a line of prior appellate decisions articulating the limits of conspiracy liability. That contention is mistaken. The cases recognize that, when a conspiracy's goals are

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[2] Recio contends (Br. 4 n.3) that "the reversal of the decision in this case to reach what may be a wrong decision in *Cruz* seems draconian," because the court of appeals should be given an opportunity to consider the sufficiency of the evidence "without reference to *Cruz*." But the sufficiency of the evidence, without reference to *Cruz*, to establish respondents' participation in the conspiracy after the seizure of the drugs has never been an issue in this case. The findings recited above make clear that, absent the erroneous rule of *Cruz*, overwhelming evidence supports the jury's verdict.

finally foiled and the conspirators are informed of that fact, the conspiracy may well terminate—not because its goals were frustrated, but because the conspirators' agreement to achieve those goals is likely to have ended. But frustration of a conspiracy's goals, *unbeknownst to the conspirators*, has no bearing on their continuing liability. The cases cited by Lopez-Meza support, rather than undercut, that distinction.

Respondent's reliance (Br. 19-22) on *United States* v. *Belardo-Quiñones*, 71 F.3d 941 (1st Cir. 1995), illustrates that point. The First Circuit's decision in that case was based on the principle that "a culpable conspiracy may exist even though, because of the misapprehension of the conspirators as to certain facts, the substantive crime which is the object of the conspiracy may be impossible to commit." 71 F.3d at 944; see Pet. 12-13). Respondent notes (Br. 20) that the First Circuit stated in *Belardo-Quiñones* (71 F.3d at 943-944) that the defendant could put on a defense, if the facts supported it, that the conspiracy had ended before he joined it. But the First Circuit held that such a defense could not be based on the claim that "for [defendant], the crime of conspiracy to import marijuana had become impossible to achieve because the boat [containing the marijuana] was seized prior to [the date defendant joined the conspiracy]." *Id.* at 943. As *Belardo-Quiñones* makes clear, "[e]ven if intervening events had made the accomplishment of the criminal purpose impossible[,] all the elements of a criminal conspiracy were present" when respondent joined the conspiracy because the conspirators were continuing to pursue its goals. *Ibid.* Accordingly, under *Belardo-Quiñones*'s reasoning, any defense that the conspiracy terminated before the defendant joined had to be based on evidence that the conspirators had ceased trying to achieve their

objective—not that achieving the objective had, without their knowledge, become impossible. *Id.* at 944-945. Accord *United States* v. *Robertson*, 659 F.2d 652, 657 n.2 (5th Cir. 1981) (refusing to reverse the defendant's conviction because "[t]here is no indication [that the] defendant knew the object of the conspiracy had become impossible" through the government's seizure of drugs, and noting that "any actions taken by a person to achieve the goals of a conspiracy *believed to be still in existence* would be participating in the conspiracy") (emphasis added).[3]

Lopez-Meza also observes (Br. 23) that *United States* v. *Gibbs*, 739 F.2d 838, 845 n.18 (3d Cir. 1984), stated in dicta that a defendant may show the termination of a conspiracy "by demonstrating that its ends had been so frustrated or its means so impaired that its continuation was no longer plausible." But the court did not say that a conspiracy terminates even when the conspirators are unaware of the frustration of their purpose. Rather, from the conspirators' vantage point, continued efforts

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[3] The other Fifth Circuit cases respondent cites appear also to be based on the sound proposition that a conspiracy may terminate when the agreement to achieve its criminal goals has ceased—*i.e.*, when all members have stopped trying to carry out the agreement. See, *e.g.*, *United States* v. *Meacham*, 626 F.2d 503, 511 n.8 (5th Cir. 1980) (arrests "wiped out" the conspiracy, because "[t]he evidence introduced at trial showed that the defendants' criminal activities ended on October 10"); *United States* v. *Barnes*, 586 F.2d 1052, 1054, 1058 (5th Cir. 1978) (conspiracy ended when three of four conspirators were arrested and there was no evidence that the fourth, who had been traveling with them, continued to pursue the conspiracy's goals); *United States* v. *Killian*, 524 F.2d 1268, 1271 (5th Cir. 1975) (arrest of three co-conspirators and seizure of drugs terminated conspiracy; no evidence that anyone continued to try to distribute the drugs whose distribution was the object of the conspiracy), cert. denied, 425 U.S. 935 (1976).

to achieve their goals may remain "plausible" because they are unaware of the events that foreclose success. In this case, for instance, the conspirators did not know of the initial seizure of the drugs on November 18, and they clearly continued their efforts to ensure delivery —as shown by respondents' conduct in trying to transport the truckload of drugs to its destination. Accordingly, under the *Gibbs* formulation, the conspiracy surely did not terminate when the drugs were seized.

II. RESPONDENTS CANNOT OBTAIN REVERSAL OF THEIR CONVICTIONS ON THE THEORY THAT THE GOVERNMENT PROVED THAT THEY WERE MEMBERS OF A DIFFERENT CONSPIRACY FROM THE ONE CHARGED

A. The Ruling Below Does Not Turn On The Law Of Multiple Conspiracies

Lopez-Meza contends (Br. 25-31) that the court of appeals' decisions in *Cruz* and this case found that the defendants had participated in a *different* conspiracy from that charged by the government. But neither in *Cruz* nor in this case did the court purport to apply multiple conspiracy principles, which require a determination whether "the defendants joined together to further one common design or purpose," or, in contrast, pursued "distinct illegal ends," with "no overlapping interests between parties." *United States* v. *Shorter*, 54 F.3d 1248, 1254 (7th Cir.), cert. denied, 516 U.S. 896 (1995). The court did not make "so much as a glancing reference to the factors that [the Ninth Circuit] ha[s] found relevant to the task of distinguishing multiple conspiracies from a single conspiracy." Pet. App. 55a (O'Scannlain, J., dissenting from the denial of rehearing en banc) (citing *United States* v. *Bibbero*, 749 F.2d 581,

587 (9th Cir. 1984), cert. denied, 471 U.S. 1103 (1985), and describing those factors as "the nature of the scheme; the identity of the participants; the quality, frequency, and duration of each conspirator's transaction; and the commonality of time and goals"). In any event, "a scheme to transport a single shipment of drugs on a single occasion does not morph into two conspiracies simply because some of the original conspirators withdraw upon their arrest and cooperation with police." *Ibid.* See *United States* v. *Robinson*, 110 F.3d 1320, 1324 (8th Cir.) (change of participants does not prove that more than one conspiracy existed, because so long as "the remaining conspirators continue to act in furtherance of the conspiracy to distribute drugs, the conspiracy continues"), cert. denied, 522 U.S. 975 (1997); *United States* v. *Bullis*, 77 F.3d 1553, 1560 (7th Cir. 1996) (same); *United States* v. *Rabins*, 63 F.3d 721, 724 (8th Cir. 1995) (same).

B. The Government Did Not Prove A Different Conspiracy From That Alleged In The Indictment

Respondents were charged with being members of a conspiracy to distribute cocaine and marijuana and to possess cocaine and marijuana with intent to distribute them. Pet. App. 69a-70a, 73a. The indictment alleged that "[f]rom on or about a date uncertain, but by November 18, 1997, * * * Manuel Sotelo, Ramiro Arce, Francisco Jiminez and Adrian Lopez, defendants herein, did knowingly, intentionally, and unlawfully conspire, confederate and agree with others, both known and unknown to the Grand Jury" to commit the distribution and possession offenses. *Id.* at 69a-70a. That allegation was based on the fact that the government did not know the actual date the conspiracy began or when each of the conspirators joined the agreement.

The government did know, however, that the conspiracy had begun at least by November 18, 1997, because that is the date when the two original couriers —Sotelo and Arce—were seized with 14.8 pounds of cocaine and 369 pounds of marijuana. Accordingly, the indictment was framed to charge that the agreement came into existence "by November 18, 1997."

There is no flaw in an indictment that charges a single conspiracy when the evidence shows that the members may have changed over time. See *United States* v. *Bello-Perez*, 977 F.2d 664, 668 (1st Cir. 1992) ("It was not necessary for the jury to find that the alleged coconspirators joined the conspiracy at the same time."). That respondents joined the conspiracy at some point after its inception is therefore of no moment. *United States* v. *Curry*, 977 F.2d 1042, 1054 (7th Cir. 1992) (indictment charged a single conspiracy from about March or April 1983 through at least October 31, 1985; court noted that "Harding wisely does not argue that he should not be considered part of the alleged conspiracy because he did not join it until 1985. * * * [A] party may join a conspiracy at any time during its life span."); *United States* v. *Kelly*, 849 F.2d 999, 1003 (6th Cir.) (a single conspiracy can exist even when "the cast of characters changed over the course of the enterprise"), cert. denied, 488 U.S. 982 (1988).

Lopez-Meza also contends incorrectly (Br. 12) that the decision below and *Cruz* "rely simply on the fact that the government charged [the defendants] with joining a conspiracy, to possess with intent to deliver drugs, *that led up to the seizure of the drugs*" (emphasis added). See Lopez-Meza Br. 30 (referring to the "'theory of the indictment,' which was that [respondents] joined a conspiracy that led up to the seizure of the drugs"). But the indictment in this case did not

allege that the conspiracy culminated in the seizure of the drugs, and there is no evidence that the *Cruz* indictment did either. To the contrary, the indictment here left open the termination date of the conspiracy. And a single agreement to deliver a single load of drugs does not become two conspiracies when the conspirators change couriers upon the arrest of the original pair.

Even if the indictment were read to allege that respondents themselves joined the conspiracy by November 18, 1997, and the evidence was sufficient only to show that they joined it one day later, respondents would not be entitled to any relief based on that one-day discrepancy. As the Seventh Circuit has explained, "it is well settled that '[t]he time period of a conspiracy is determined not by the dates alleged in the indictment, but by the evidence adduced at trial.'" *United States* v. *Jackson*, 935 F.2d 832, 844 (7th Cir. 1991) (quoting *United States* v. *Guzman*, 852 F.2d 1117, 1121 (9th Cir. 1988)). That is because "so long as the time proved was within the period alleged in the indictment," time is not "an essential element" of the crime of conspiracy. *United States* v. *Davis*, 679 F.2d 845, 852 (11th Cir. 1982); accord *United States* v. *Bowers*, 739 F.2d 1050, 1053 (6th Cir.), cert. denied, 469 U.S. 861 (1984); *United States* v. *Izzi*, 613 F.2d 1205, 1210-1211 (1st Cir.), cert. denied, 446 U.S. 940 (1980). See also Pet. App. 37a (Gould, J., dissenting) (citing cases). Proof of a narrower conspiracy than that charged in the indictment (in duration, scope, or membership) may give rise to a variance, but a defendant is not entitled to relief absent a showing of prejudice. See, *e.g.*, *Berger* v. *United* States, 295 U.S. 78, 81-83 (1935); *United States* v. *Jackson*, 935 F.2d at 844.

In this case, there was never any doubt that the proof of respondents' participation in the conspiracy would

center on their conduct on November 19, when they were found with the drugs. Accordingly, a one-day difference between the date charged in the indictment and the date proven at trial could not have prejudiced respondents in any way, and no fatal variance could be shown. See *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985); *United States* v. *Ragen*, 314 U.S. 513, 526 (1942). Certainly, respondents could not carry their burden to show plain error, the standard applicable to respondents in light of their failure to object at trial.[4] Pet. App. 37a (Gould, J., dissenting).

C. *Kotteakos* and *Broce* Do Not Assist Respondents

Lopez-Meza contends (Br. 25-26) that *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *United States* v. *Broce*, 488 U.S. 563 (1989), support his multiple-conspiracy theory. That claim is unfounded. In *Kotteakos*, the government conceded that there were multiple conspiracies to violate the National Housing Act instead of the single conspiracy charged in the indictment. While there was one common key figure (Brown) who assisted all of the defendants in obtaining fraudulent loans, "the other defendants did not have any relationship with one another"; they "all dealt independently with Brown as their agent"; and each group of defendants obtained loans for separate and independent objectives that did not benefit other groups. *Id.* at 754-756. The Court found prejudice to the defendants' substantial rights because of "[t]he dangers of transference of guilt from one to another across the line separating the conspira-

[4] In any event, the November 18 date alleged in the indictment played no role in the panel majority's analysis, which mistakenly assumed that respondents were arrested on November 18. Pet. App. 2a-3a; see U.S. Br. 2 n.1.

cies, subconsciously or otherwise." *Id.* at 774. Unlike in *Kotteakos*, the government in this case charged *and* proved a single conspiracy, but the court of appeals found the evidence insufficient to show respondents' participation in a *pre-seizure* conspiracy as required by *Cruz*.

Lopez-Meza's reliance on *Broce* is equally misplaced. *Broce* held that, in light of the defendants' guilty pleas, the defendants could not challenge their convictions on two charges of conspiracy based on the theory that the two charges alleged the same offense; the Court reasoned that the guilty pleas constituted admissions that the offense were separate. 488 U.S. at 576. As respondent notes (Br. 29-30), the Court in *Broce* stated that "multiple agreements to commit separate crimes constitute multiple conspiracies." *Id.* at 571. In this case, however, the government charged a single agreement to distribute drugs, not multiple conspiracies to commit separate crimes. The seizure of the drugs, unbeknownst to the conspirators, in no way converted that single agreement into "multiple agreements to commit separate crimes" as described in *Broce*.

III. "POLICY CONSIDERATIONS" DO NOT SUPPORT THE COURT OF APPEALS' RESULT

Recio does not challenge, and Lopez-Meza is unable to sidestep, the century of precedent holding that impossibility is not a defense to conspiracy liability. U.S. Br. 12-23. Recio nevertheless invites this Court (Br. 5) to reconsider that precedent based on three "policy considerations." None of the three bases that Recio identifies, whether considered alone or in combination, would justify such a radical reversal of long-established legal doctrine.

First, Recio argues (Br. 6) that conspiracy liability in the circumstances of this case is unjustified because "an actor joining a conspiracy under the watchful eye of government law enforcement officials" does not pose any greater danger to society than an individual "acting alone." But conspiracy law has always punished individuals who combine with others to achieve unlawful objectives not only because the group action makes attainment of the illegal end more likely, but also because such groups may spawn other, unanticipated crimes. See U.S. Br. 12-13. An individual who manifests his willingness to participate in such conspiracies warrants punishment whether or not government surveillance is effective in preventing the particular crime he conspired to commit. And taken to its logical limit, Recio's theory would prevent any liability in a typical "reverse sting" undercover operation, *i.e.*, where the government offers to sell drugs, because such an individual could never, in fact, complete the crime that he intends to commit as a result of the "watchful eye" of law enforcement.

Recio also claims (Br. 7) that impossibility should be recognized as a defense because "the law of conspiracy is confusing and complicated." But, as illustrated by the divided decision of the court below and the *Cruz*-required jury instruction given in this case, see Pet. App. 73a-76a, it is the recognition of such a defense that adds considerable confusion, complexity, and arbitrariness to the law of conspiracy. See also *id.* at 24-29. Recio cites *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000), as an example of the purported confusion over the rule that impossibility is not a defense to conspiracy, but there is nothing confusing about the result in that case. The court in that case observed that the government could not establish conspiracy liability, be-

cause "the transaction described by the government does not violate [the Federal Election Campaign Act of 1971]." *Id.* at 779. The court went on to explain that a conspiracy charge cannot be based on an agreement to do something that is not a crime and provided as an example "a charge of conspiracy to shoot a deer" when "the law does not prohibit shooting deer in the first place." *Ibid.* While the court characterized that example as "[p]ure legal impossibility," it is better understood as simply a statement of the self-evident rule that an indictment must allege a crime, and an agreement to do an act that is not criminal is not a crime. See U.S. Br. 15 & n.3.

Finally, Recio argues (Br. 7-8) that law enforcement officials and prosecutors are capable of making the "fine distinctions" that *Cruz* and the decision below require them to make. The government, however, should not have to place conspiracy prosecutions in potential jeopardy under the *Cruz* rule when law enforcement intervenes to frustrate completion of a crime. In this case, respondents picked up a truck loaded with 369 pounds of marijuana and 14.8 pounds of cocaine and tried to drive it to its destination. They did so in concert with others who sought to complete the delivery, unaware that the drugs had already been seized. There is no reason why the government should have had to permit the drugs to pass unhindered into new conspirators' hands in order to continue to investigate the scope of the conspiracy, or why the government should have had to make an artificial distinction between one conspiracy that occurred before the seizure and a second that occurred after. "What was essential is that the criminal goal or overall plan have persisted without fundamental alteration, notwithstanding variations in

personnel and their roles." *United States* v. *Bello-Perez*, 977 F.2d at 668. The distinction that Recio would weave into the law serves no purpose other than to obscure the single conspiracy that existed in this case.

Along the same lines, Lopez-Meza contends (Br. 35) that the *Cruz* rule does not "create[] any additional burdens or obstacles to hinder the government's ability to bring wrongdoers to justice" because he could still be prosecuted for a substantive charge. That will not always be true, however; in some cases, the conspiracy may not have progressed to the point of a substantive violation, and there is no general federal criminal attempt statute. In such instances, respondent's approach could put law enforcement in the untenable position of having to choose between crime prevention and crime prosecution. In addition, prosecutors may not always bring all available charges, and the reversal of a conspiracy conviction under *Cruz* after the statute of limitations has run may eliminate the possibility of prosecution for substantive offenses altogether. The *Cruz* rule also threatens to complicate trials in conspiracy cases, as prosecutors attempt to determine who may be joined in a single count, and whether joint trials of multiple defendants are permissible. See U.S. Br. 28-29. Finally, the availability of alternative charges in some cases provides no basis for introducing into conspiracy law a novel defense that has no foundation in the reasons why conspiracies are prohibited.

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For the foregoing reasons, and for those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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